



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

March 13, 1962

Honorable Dan Brazil
County Attorney
Angelina County
Lufkin, Texas

Opinion No. WW-1278

Re: Whether it is a violation of
law for a father to act as
midwife on the delivery of
his own child without being
a registered midwife.

Dear Mr. Brazil:

We have studied your letter requesting an opinion of this office on the question of whether it is a violation of law for a father to act as a midwife on the delivery of his own child without being a registered midwife.

We have examined the statutes of this State and have not found any statute requiring a midwife to register or secure a license.

The only question that could arise from the conduct outlined in your request is that such conduct might constitute the illegal practice of medicine. Articles 739 through 741, Vernon's Penal Code, set forth the terms and provisions of this offense. Article 4510, Vernon's Civil Statutes, and Article 741, Vernon's Penal Code, define what is meant by "practicing medicine." Article 741 provides as follows:

"Any person shall be regarded as practicing medicine within the meaning of this Chapter:

"1. Who shall publicly profess to be a physician or surgeon and shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof.

"2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas and Article 4504, Revised Civil Statutes of Texas as contained in this Act.

Acts 1907, p. 224; Acts 1949, 51st Leg., p. 160, ch. 94, §20(b); Acts 1953, 53rd Leg., p. 1029, ch. 426, §11."

As will be noted from Article 741 there are two distinct ways by which a person shall be regarded as practicing medicine. We assume from your letter that the husband involved has not publicly professed to be a physician or surgeon. Therefore, if he is to be regarded as practicing medicine it must be under the provisions of Section 2 of Article 741.

One of the essential elements of Section 2 is that such person receive, directly or indirectly, compensation for a diagnosis, or treatment of a disease, disorder or injury.

Banti v. State, 289 S.W.2d 244 (Tex.Crim. 1956), is the leading Texas case on this question. The Court held that a woman who had received compensation for acting as a midwife was not "practicing medicine" as that term is defined in Article 741, Vernon's Penal Code. The Court said in part as follows:

"It would appear, however, that the Legislature of Texas has not defined the practice of medicine so as to include the act of assisting women in parturition or childbirth insofar as the practice of medicine without registering a certificate evidencing the right to so practice is made punishable as an offense.

". . .

"We agree that childbirth is a normal function of womanhood, and that proof that appellant for a consideration agreed to and did attend Julia Valdez at childbirth does not support the allegation of the complaint and information that she treated or offered to treat Julia Valdez for a disease, disorder, deformity or injury or effect a cure thereof.

"Not only has the Legislature failed to include within the definition of 'practicing medicine' the branch of medical science which has to do with care of women during pregnancy and parturition called 'obstetrics' but has in a number of statutes recognized practical obstetrics or mid-wifery as outside the realm of the medical practice act."

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It is our opinion, therefore, that a father who acts as a mid-wife on the delivery of his own child and who does not publicly profess to be a physician or surgeon is not in violation of the medical practice act.

SUMMARY

A husband who acts as a mid-wife in the delivery of his own child and who receives no compensation therefor and who does not publicly profess to be a physician or surgeon and who does not diagnose, treat or offer to treat any disease, disorder or injury is not violating the medical practice act of this State.

Very truly yours,

WILL WILSON
Attorney General of Texas

By *Marvin F. Sentell*
Marvin F. Sentell
Assistant Attorney General

MFS:sh:wb

APPROVED:

OPINION COMMITTEE

W. V. Geppert, Chairman
Elmer McVey
Robert Lewis
Virgil Pulliam
Linward Shivers

APPROVED FOR THE ATTORNEY GENERAL

BY: Houghton Brownlee